

41
MT 76
1988
H 56

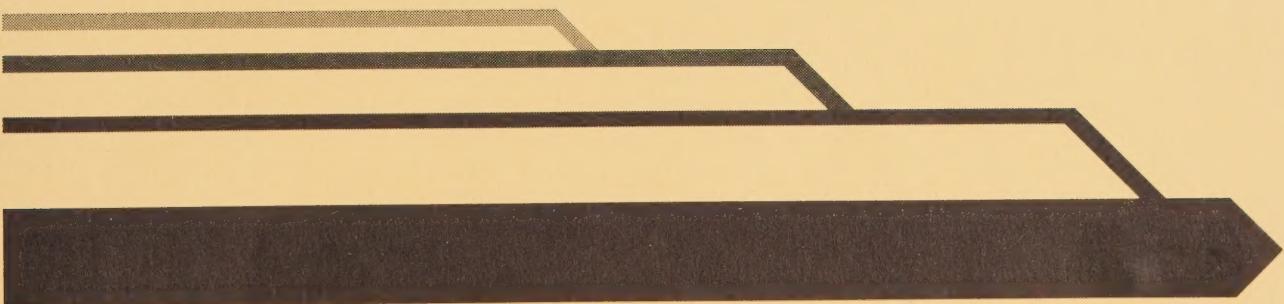
Publicat

Improving The Regulatory Process



Current Position on Submitters' Suggestions

National Energy Board
September 1988



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto



<https://archive.org/details/31761117086421>

Preface

On 20 February 1987 the Board issued a letter to interested parties, inviting them to comment on steps that could be taken to improve the regulatory process and, in particular, to reduce the amount of time consumed in public hearings. In its letter, the Board listed a number of measures it could implement on its own, together with other steps which would require the cooperation of all parties involved in hearings. It invited interested parties to submit their views on the proposals by 31 March 1987.

The comments received on the Board's proposals were generally favourable, and on 30 June 1987 the Board advised interested parties of its intentions respecting implementation of the proposals.

In replying to the Board's call for comment of 20 February 1987, parties raised 20 additional suggestions not dealt with in the Board's proposals. Interested parties were advised that the Board was in the process of analyzing the new suggestions and would, where appropriate, be in touch with parties about them.

In December 1987, the Board issued a discussion paper which set out its initial reaction to the 20 suggestions. Parties were invited to submit reply comments by 28 February 1988, a date subsequently moved back to the end of March 1988. The Board then reviewed its initial response in light of the reply comments. The purpose of this report is to communicate the Board's current position to all parties interested in improving the regulatory process.

Contents

		Page
<i>Introduction</i>		1
<i>General</i>	1. Negotiated Settlements 2. Rulemaking 3. Ongoing Information Requirements 4. Two-Year Test Period 5. Combining Facilities Applications and Toll Methodology 6. Toll Determination Principles 7. Time Limits 8. Role of Board Staff	2 4 5 6 8 9 9 10
<i>Pre-Filing</i>	9. Draft Applications 10. Application Filing Requirements	12 12
<i>Pre-Hearing</i>	11. Pre-Hearing Conferences 12. Pre-Hearing Information Requests 13. Interventions	14 15 16
<i>Hearing</i>	14. Hearing Location 15. Direct Testimony and Cross-Examination 16. Written Final Argument 17. Natural Justice 18. Hearing Costs 19. Reasons for Decision 20. Technical Conferences	17 17 18 19 20 21 23

Introduction

This report on improving the regulatory process contains a review of 20 regulatory areas which were targetted for improvements by interested parties. These areas are grouped in the report by content: general, pre-filing, pre-hearing, and hearing. The regulatory areas within these groups are addressed at random.

Each area begins with a brief summary of the comments and views received from interested parties advocating an improvement in the regulatory process. Any suggested changes to the National Energy Board Act are also mentioned. Following this summary is a section entitled ***Rationale*** which provides submitters' arguments for their proposals.

A section called ***Regulatory Principles Involved or Board Concerns*** provides an analysis of the effect which the suggested changes would have on the current applicable regulations or the Board's concerns.

The Board's reactions to the suggestions received are given under ***Initial Board Reaction***. These were shared with interested parties in a discussion paper issued in December 1987. Interested parties were invited to submit their reply comments and these are given under ***Parties' Reply Comments***.

The final section, ***Board's Current Position***, provides the Board's stance on each of the issues. Interested parties should use this section to guide them in their dealings with the Board on the various regulatory matters. However, the Board is mindful of the need to continue to monitor, on an ongoing basis, the effects and efficiency of its regulatory process. Where warranted, the Board will consult with interested parties for comment on the regulatory process and make further changes as required.

General

1. Negotiated Settlements:

Strong support appears to exist among submitters for the Board to adopt procedures which would allow for settlement (or partial settlement) of issues by agreement between parties in toll proceedings. Although the concept of settlement was supported in many of the submissions, there were diverse views on how it should be applied in practice. These views range from one extreme of having settlements result from confidential negotiations between parties, with the Board's role confined to only accepting or denying them and always accompanied by reasons for its decision, to the other extreme of having the Board conduct a public settlement proceeding. Variations between these two extremes were also suggested. In addition, some parties suggested that the National Energy Board Act be changed to expressly allow for negotiated settlements as a cost-saving measure.

Rationale:

Board acceptance of negotiated settlements in toll matters would shorten public hearing time or even eliminate the need for a public hearing, thereby reducing the cost of regulation.

Regulatory Principles Involved or Board Concerns:

Pursuant to section 52 of the Act, the Board has a duty to ensure that all tolls are just and reasonable. The tolls charged by major pipelines affect a large part of the general population and require a careful balancing of the interests of consumers, producers, shippers and investors. In order to take proper account of these often conflicting interests, the Board conducts its hearings in an open forum so that all parties are accorded an equal opportunity to present their views directly to the decision-maker and to examine and test the views of others, all of which form part of the public record.

The Board's objective in balancing the many interests is to ensure that transportation services are provided on a continuing basis, without unjust discrimination and in a cost-efficient manner approaching the costs that would prevail in a competitive market, recognizing that other factors such as government policies and competition from other energy forms may affect regulation.

In light of these principles, the Board believes that an acceptable settlement process would need to address the following concerns:

- (i) parties affected by a settlement should have a fair opportunity to participate and have their interests recognized and appropriately weighed,
- (ii) a negotiated settlement process should not fetter the Board's ability and discretion to take into account the full public interest which often extends beyond the immediate concerns of the negotiating parties,
- (iii) the settlement process must produce adequate information on the public record for the Board to satisfy itself that the negotiated settlement would result in tolls which are just and reasonable,
- (iv) the Board's role as an independent adjudicator must not be impinged by being a party to the negotiations,
- (v) the Board cannot accept "package deal" negotiated settlements consisting of various elements, not all of which might, in the Board's judgment, result in tolls which are just and reasonable.

There is also a problem of process. If the Board does not intend to accept a negotiated settlement, the applicant is entitled to be given notice so that he may lead evidence to bolster his case. This would require the Board to issue an interim decision on the acceptability of the negotiated settlement, perhaps indicating, in the case of a denial, the elements of the settlement which are unacceptable. This is not an insuperable problem, but it points out the difficulties involved in reaching a decision on elements of a case without a full hearing record.

Initial Board Reaction:

The Board is prepared to consider settlement procedures which take the foregoing concerns into account either as an accepted general practice or on a case-by-case basis. The Board does not believe that the existing wording of the Act precludes settlements and does not intend to recommend an amendment to the Act which would cause fundamental changes to its responsibility to determine just and reasonable tolls.

The complaint procedure introduced to reduce the regulatory burden on Group 2 pipeline companies and on three smaller Group 1 companies is in fact a type of settlement process adopted by the Board where it was satisfied that the public interest could be better served in this manner.

The Board invites submitters to make further suggestions regarding settlement procedures for Group 1 pipeline companies which would address the Board's concerns.

Parties' Reply Comments:

Parties were generally pleased that the Board is prepared to consider settlement procedures, but some saw the five caveats as serious impediments to putting a procedure into practice. Others were more positive, with one company, Trans Québec & Maritimes Pipeline Inc., setting out the framework of a procedure which it felt could satisfy the Board's concerns.

Board's Current Position:

Having indicated that it is receptive to the settlement process but having also identified various concerns, the Board believes it is now up to applicants to attempt to devise settlements compatible with the Board's criteria. The Board will itself be examining issues as they come before it to determine if they might be candidates for a negotiated settlement, and invites potential applicants to do likewise.

2. Rulemaking:

Mixed views were received on the benefits of using rulemaking to develop policies on generic type issues.

Rationale:

Parties favouring rulemaking believe such a procedure would establish a general framework for major issues, making it easier for applicants to tailor their filings to those guiding principles. Parties opposed argued that general treatment of issues often serves no useful purpose and is a waste of time, manpower and money.

Regulatory Principles Involved or Board Concerns:

The Board agrees that consistency in the application of regulatory principles is desirable, but suggests that there are a number of factors which could limit the benefits of rulemaking proceedings in Canada. These include:

- (i) the small number of pipeline companies that are regulated by the Board,
- (ii) companies which carry out the same function can find themselves in considerably different circumstances,
- (iii) appropriate treatment of issues can be time dependent, i.e., the economic climate, regulatory regime, etc., can

all be factors in determining the appropriate resolution of issues, and

- (iv) Hearing Panels must have independence to decide cases on the basis of the evidence.

In light of these factors, the Board questions whether rulemaking would indeed help streamline the regulatory process, or whether it would add another layer of activity. The principles applicable to a given pipeline can be readily discovered by examining recent decisions.

Initial Board Reaction:

The Board is not convinced, on the basis of what it has heard, that rulemaking would streamline the regulatory process for Canadian pipelines.

Parties' Reply Comments:

Parties agreed that general treatment of issues by use of generic hearings serves no useful purpose. Two parties, however, suggested that an alternative worth considering is the preparation and circulation by the Board of draft position papers on issues to solicit comments from interested parties before arriving at final positions.

Board's Current Position:

The Board maintains its position that rulemaking is unlikely to streamline the regulatory process. With respect to issuing draft position papers, the Board believes there is some scope to use such an approach to resolve certain matters relating to procedure and methodology, an example being the recent ruling on communication between counsel and witnesses. The impartiality of the Board when adjudicating regulatory issues, however, is best preserved by hearing the views of the affected parties prior to arriving at any position.

3. *Ongoing Information Requirements:*

A concern was expressed by the major pipeline companies that the Board's ongoing information requirements are too onerous.

Rationale:

Citing circumstances which now exist relative to deregulation, increasing focus on reducing regulatory burden, and the recognition of regulation on a complaint basis, the major pipeline companies used quarterly surveillance reports as an example of where the level of information required should be re-examined.

*Regulatory Principles
Involved or Board
Concerns:*

Deregulation has not affected the Board's responsibility to monitor the actual earnings of jurisdictional operations against the earnings authorized in tolls approved by the Board, nor the responsibility of the Board to take appropriate action as required. The Board is sensitive to the burden that reporting can place on companies and has attempted to limit the information obtained through quarterly reports to the same kind of financial data that might be reported to company management.

Initial Board Reaction:

The Board plans to continue its practice of reviewing with individual companies the content of surveillance reports in an effort to obtain the information that the Board and interested parties require while placing the minimum reporting burden on the company.

*Parties' Reply
Comments:*

Parties expressed support for the Board's objective of reducing the amount and cost of regular reporting and again cited quarterly surveillance reports as being particularly onerous.

Board's Current Position:

The Board adopts its initial reaction as its current position.

4. Two-Year Test Period:

Cautious support was expressed for the concept that toll hearings be held biennially rather than annually. It was recognized, however, that mechanisms would need to be developed for adjusting tolls in the interval between hearings.

Rationale:

The expense of public hearings would be reduced if toll hearings were held every two years rather than annually.

*Regulatory Principles
Involved or Board
Concerns:*

There is no requirement by statute or in Board practice that determines the frequency of public hearings on toll matters. In fact, the frequency varies considerably by company as shown in the following table.

The table shows that the issue of annual toll hearings arises primarily with three of the Group 1 gas pipeline companies, TransCanada PipeLines Limited, Trans Québec & Maritimes Pipeline Inc. and Westcoast Energy Inc. At the Board's initiation, TQM and Westcoast agreed to try the two-year test period approach in their current proceedings, although this was done largely as a way to catch-up and

return to a forward test year. Westcoast applied in December 1986 and TQM in April 1987 for the two-year test period 1987/88. In both cases hearings were held during the first test year and decisions released in December 1987 resulting, in effect, in only a single forward test year.

Year In Which a Hearing Started

	1980	1981	1982	1983	1984	1985	1986	1987
Alberta Natural Gas Company Ltd.	Yes	-	Yes	-	-	-	-	-
Cochin Pipe Lines Ltd.	Yes	-	-	-	-	-	-	-
Foothills Pipe Lines (Yukon) Ltd.	Yes	Yes	Yes	-	Yes	-	-	Yes
Interprovincial Pipe Line Limited	Yes	-	-	Yes	-	-	-	Yes
Interprovincial Pipe Line (NW) Ltd.	-	-	-	-	-	-	-	-
TransCanada PipeLines Limited	Yes	-						
Trans Mountain Pipe Line Company Ltd.	Yes	-	-	Yes	Yes	Yes	-	-
Trans-Northern Pipelines Inc.	-	Yes	-	-	-	Yes	-	Yes
Trans Québec & Maritimes Pipeline Inc.	n.a.	n.a.	n.a.	Yes	Yes	-	Yes	Yes
Westcoast Energy Inc.	Yes	Yes	-	Yes	Yes	-	Yes	Yes

Initial Board Reaction:

The Board would like to try the two-year test period approach where circumstances warrant. The Board appreciates the difficulty of forecasting some 24 to 30 months into the future and expects that some procedures for adjusting tolls during their two-year life will need to be developed if this method is to become commonly used.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board continues to study the appropriateness of a two-year test period for particular companies.

5. *Combining Facilities Applications and Toll Methodology:*

Rationale:

It was suggested by two submitters that facilities applications and toll methodology be considered in the same proceeding, or as close together as possible.

The Board's consideration of toll methodology at facilities hearings would ensure that projects are not endorsed under the assumption of one toll methodology, only to see it changed after an investment is made.

Regulatory Principles Involved or Board Concerns:

The Board recognizes that there are instances where toll methodology has the potential to redistribute risks in such a major way as to affect the position an applicant or interested parties may take in supporting a facilities application. In such instances, parties would likely urge the Board to hold combined hearings under Parts III and IV of the Act. This was done in 1980 for the Interprovincial Pipe Line (NW) Ltd. pipeline hearing, and is currently being done for TransCanada's 1988/89 facilities application.

Initial Board Reaction:

The Board will continue to examine facilities applications on a case-by-case basis to determine whether combined facilities and toll methodology proceedings are appropriate.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

Where a facilities application by its very nature raises important toll methodology/design issues, the Board will in future examine and resolve both these issues at the same time.

6. Toll Determination Principles:

In addition to procedural issues, submitters raised a number of concerns relating particularly to toll determination principles and philosophy. The issues mentioned could be grouped as follows:

- (i) concerns about the amount of hearing time spent on return on equity and debt/equity ratio,
- (ii) difficulties arising from the use of interim tolls,
- (iii) the use of test periods which don't reflect the business operation of applicants,
- (iv) improvements in toll schedules, and
- (v) the level of regulation of oil pipelines.

Rationale:

The thrust of all of these concerns appears to be more efficient regulation.

Regulatory Principles Involved or Board Concerns:

Toll determination principles are based on careful consideration of the evidence in specific hearings. The current streamlining exercise does not appear to be a suitable forum for reviewing such principles. Also, the Board has expressed, under item 2), its concerns about the usefulness of generic proceedings.

Initial Board Reaction:

The Board does not intend to pursue toll determination principles as part of this exercise, and invites parties who have such concerns to raise them in the appropriate public toll hearing.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

7. Time Limits:

One submitter suggested that time limits be placed on the Board's processing of non-hearing applications.

Rationale:

None provided.

*Regulatory Principles
Involved or Board
Concerns:*

The Board attempts to process all applications as expeditiously as possible, while respecting the principles of fairness and natural justice. Processing times are affected by a number of factors, including the complexity of the application, the extent of public interest and the completeness of the filed material, and can vary from a number of days to several months. It would be difficult to establish a full range of times to cover the various stages or phases for processing all non-hearing applications.

Initial Board Reaction:

Given the complexity of establishing "classes" of applications and timing that would be appropriate in all events, the Board is not persuaded that this initiative would provide meaningful streamlining to the regulatory process.

Parties' Reply Comments:

Parties supported the Board's initial position, but added that the time limits currently established for Class 1 and 2 toll adjustment applications are not being met.

Board's Current Position:

The Board adopts its initial reaction as its current position on the general subject of time limits. The Board intends to review the toll adjustment procedures in light of the concern brought to its attention by parties that the time limits currently established for Class 1 and 2 toll adjustment applications are not being met.

8. *Role of Board Staff:*

A number of submitters suggested a more visible role for Board staff in hearings. It was suggested that:

- (i) staff views on an application should be made available to intervenors, and
- (ii) Board staff should be available as witnesses in hearings.

Rationale:

With respect to the first point, submitters felt it would be useful to intervenors with limited resources if the expertise of Board staff were available to them in terms of summaries of the issues, or even opinions on the issues including the evidentiary basis for those opinions. The second point was supported by submitters who argued that, if staff are in effect making a case on issues to the Board, fairness requires that all parties know the positions which staff are taking and be afforded an opportunity to address those positions.

*Regulatory Principles
Involved or Board
Concerns:*

The National Energy Board Act does not draw a distinction between the role of staff and the role of the Board. The staff assists the Board in carrying out its regulatory responsibilities under the Act and does not have an independent function of its own. The Board looks to its staff to play an objective and neutral role in ensuring that applications are thoroughly examined in public hearings, all relevant deficiencies and issues identified, and relevant options explored.

Initial Board Reaction:

In light of the principles enumerated above, it would not be appropriate for the staff to take on the function of advising parties on the substance of applications to the Board. Turning to the second point, while a vigorous pursuit of the staff's responsibilities as described above may at times appear adversarial, the Board is continually mindful that the concept of neutrality and objectivity must be pursued if the current model, which has served the public interest well for more than a quarter of a century, is to have continued acceptability. The establishment of a separate trial division staff would likely be needed to implement the above suggestions. The Board is not persuaded that this is necessary or desirable.

Parties' Reply Comments:

Parties accepted the principle of a neutral and objective staff, but it is clear from the comments that parties are not convinced that this always occurs.

Board's Current Position:

The Board adopts its initial reaction as its current position. It is concerned, however, with the extent of the skepticism regarding staff neutrality and objectivity, and will redouble its efforts to ensure that these principles are seen to be respected.

Pre-Filing

9. Draft Applications:

Rationale:

Two submitters suggested that pre-filing consultation with Board staff be extended to include examination of draft applications.

Regulatory Principles Involved or Board Concerns:

Examination of the draft application by Board staff would help to ensure that it was complete prior to filing with the Board.

The Board continues to believe in the fundamental principle of being equally helpful to any and all parties interested in an application. Equally well ingrained is the principle that the onus for making its case rests with the party who is applying to the Board. Another basic principle of proper regulatory conduct is that statutory decision-makers must not only be independent but must be seen to be so. The Board believes that these principles are best upheld by publishing its information requirements and meeting with parties as necessary to explain them. However, reviewing and commenting on draft applications is not consistent with the latter two principles.

Initial Board Reaction:

The Board recognizes it has an obligation to make itself and its staff available for consultation with applicants or potential applicants on matters such as procedure, filing requirements, etc., but is not prepared to have its staff review and comment on draft applications.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

10. Application Filing Requirements:

Several modifications were suggested to the Board's filing requirements including a reduced level of service on inactive parties, earlier identification of active parties based on previous proceedings, elimination of the need to resubmit information filed with prior applications, and a better organization of prefilled testimony. One submitter enumerated improvements that could be made to financial statements accompanying toll applications.

Rationale:

The suggestions were generally based on more efficient use of time and money by the applicant and intervenors.

Regulatory Principles Involved or Board Concerns:

The Board's filing requirements and procedures are set out in the draft NEB Rules of Practice and Procedure which were approved by the Board in October 1986 following extensive consultation with interested parties and subsequent testing in a trial period. These are general rules intended to cover all proceedings, but the Board may dispense with, vary or supplement any of the provisions of the rules to fit the circumstances of a particular proceeding.

Initial Board Reaction:

It appears to the Board that the draft NEB Rules of Practice and Procedure provide sufficient latitude for the Board to adopt filing requirements as appropriate, based on specific requests interested parties may have for improving a particular proceeding. Modification to the general filing requirements of the Rules would not appear warranted based on the comments received at this time.

Parties' Reply Comments:

Parties generally agreed with the Board's initial reaction, with only one party suggesting extensive changes to filing requirements.

Board's Current Position:

The Board adopts its initial reaction as its current position.

Pre-Hearing

11. Pre-hearing Conferences:

There was broad agreement among submitters that the increased use of pre-hearing conferences could significantly streamline the regulatory process.

Rationale:

Pre-hearing conferences would result in more efficient use of hearing time if they were used to confine material to the major issues and agree on hearing procedures and timing. Parties appeared to agree that such a conference should be held well in advance of the hearing. Views on who should conduct the conference ranged from staff, to a single Member, to the same Panel which would hear the application.

Regulatory Principles Involved or Board Concerns:

The Board's practice is to hold pre-hearing conferences when it considers it appropriate to expedite the hearing process. This provision is found in Section 15 of the draft NEB Rules of Practice and Procedure. The Board believes that the following considerations are relevant to the effective use of pre-hearing conferences:

- (i) conferences held too soon after filing of an application are not likely to be useful as parties will not have had sufficient time to become familiar with the issues,
- (ii) identification of issues can be done efficiently in writing as is done at present,
- (iii) information about procedures and dates is continuously available by telephone from the Secretary, Board Counsel, and Information Services, and
- (iv) the Board continues to encourage potential applicants to meet with affected parties to increase their understanding of the application.

Initial Board Reaction:

The Board has established procedures for convening a conference and is prepared to use them where appropriate.

Parties' Reply Comments:

Parties generally agreed with the Board's initial reaction, but believed that the usefulness of pre-hearing conferences could be improved if they were used to resolve or narrow the range of issues and resolve potentially disruptive motions.

Board's Current Position:

The Board will continue to use pre-hearing conferences when it appears that they will improve the hearing process,

and will take account of the additional suggestions of parties.

12. Pre-Hearing Information Requests:

Submitters generally supported increased use of information requests, with the qualification that information requests should be accompanied by a justification, and that additional time would be required between the filing of an application and the start of the public hearing. Two submittors cautioned that information requests can lengthen the process if the result is a large number of additional and not necessarily useful questions.

Rationale:

Information requests, if properly used, have the potential for reducing the amount of cross-examination in hearings and for improving its quality.

Regulatory Principles Involved or Board Concerns:

The Board's practice is to describe the procedures to be used for information requests in a Directions on Procedure which is published shortly after a complete application is filed. The procedure normally provides for a first round of information requests to, and responses from, the applicant. This is generally followed by a second round of information requests to intervenors. Responses are required to be filed prior to commencement of the public hearing. In establishing the timetable for information requests, the Board attempts to balance the interest of the applicant for expeditious treatment with the intervenor's desire for time to analyze the application. For a major hearing, there would normally be about two months from the first round of information requests to the start of the hearing. Information requests prepared by the Board generally contain a preamble which sets out the reason for making the request. In addition to the above formal procedure, information requests are acceptable at any time during the hearing process where their use will help clarify issues, reduce cross-examination and shorten hearings.

Initial Board Reaction:

The Board favours the use of information requests and is receptive to the suggestion that they all indicate the purpose of the question. It does not accept that more time should normally be allowed prior to the start of the public hearing. Finally, the Board will be watchful in future public hearings to see if certain questions might not have been better dealt with using information requests.

<i>Parties' Reply Comments:</i>	Parties were in general agreement with the Board's initial reaction.
<i>Board's Current Position:</i>	The Board adopts its initial reaction as its current position.
13. Interventions:	Stricter requirements on the admission of intervenors were favoured by some submitters. In particular, intervenors should have to declare their interest in the application, the issues of concern to them, and whether they intend to file evidence.
<i>Rationale:</i>	Although submitters did not provide a clear rationale, it appears that the basis for this recommendation is that it would permit all parties to better prepare for the hearing.
<i>Regulatory Principles Involved or Board Concerns:</i>	Section 32 of the draft NEB Rules of Practice and Procedure requires, among other things, that a written intervention contain a description of the intervenor's interest in the proceeding and a statement of issues which the intervenor intends to address at the public hearing. A 15-day grace period is allowable under certain circumstances.
<i>Initial Board Reaction:</i>	The Board recognizes that Section 32 is not being rigidly enforced. In some respects, the Board's initiative in preparing an issues list, which is attached to the Directions on Procedures, has superseded the requirement in Section 32. The Board's view is that no party to a hearing should be excluded from addressing any matters on the issues list or from having the opportunity to seek the Board's approval of adding to the list any items believed to be relevant.
<i>Parties' Reply Comments:</i>	The Board agrees that current practice and the requirements of Section 32 are inconsistent, and intends to review that section.
<i>Board's Current Position:</i>	Parties expressed mixed views on the need for stricter requirements on intervenor qualifications. General support was expressed for the Board's initiative of preparing an issues list.
	As indicated above, Section 32 will be re-examined.

Hearing

14. Hearing Location:

Submitters encouraged the Board to increase its practice of holding hearings, or portions of hearings, away from Ottawa at locations nearest to the majority of witnesses and counsel.

Rationale:

Scheduling hearings in the home city of the majority of interested parties would reduce their costs.

Regulatory Principles Involved or Board Concerns:

It is the Board's policy to consider the area of concentration of public interest in an application when choosing a hearing location in order that concerned parties have an opportunity to participate as fully as possible. The Board must also take into account other factors such as the time and other constraints that a hearing outside Ottawa will place on other regulatory activities of the Board. Because of this, the Board does not usually sit outside Ottawa/Hull for more than two consecutive weeks on any one hearing.

Initial Board Reaction:

The Board will endeavour to hold hearings, or portions thereof, outside Ottawa in instances where this will enhance the opportunity for interested parties to participate.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

15. Direct Testimony and Cross-Examination:

Submitters offered a list of suggestions aimed at improving the oral portion of public hearings including:

- (i) prefilled testimony should be better organized as to issue area and witness,
- (ii) witness panels should be established well in advance of the hearing,
- (iii) an outline of cross-examination should be provided a day in advance,
- (iv) cross-examination on minor issues should be done in writing,
- (v) Board Counsel should cross-examine first and last, and
- (vi) hypothetical questions should not be allowed.

Rationale:

While a rationale was not usually stated, the thrust of the suggestions appears to be to make more efficient use of hearing hours.

Regulatory Principles Involved or Board Concerns:

The Board has, in recent hearings, placed emphasis on establishing a comprehensive issues list around which panels and evidence can be organized. This should assist in responding to suggestions i) and ii). The purpose of cross-examination is often to test the competence of witnesses; accordingly the Board wonders about the practicality of iii). Minor issues are already being resolved by information requests as suggested in iv). The Board accepts that there may be some circumstances where it is appropriate for Board Counsel to cross-examine first and last, particularly where the purpose of the first round is to seek clarification. The Board notes that it has signalled its areas of concern to hearing participants through preparation of an issues list and its information requests. With respect to the final point, the Board notes that matters of principle are often hypothetical. Onus should be on counsel, however, to make sure the witness understands the assumptions. Perhaps these could be provided to the witness in writing.

Initial Board Reaction:

These suggestions generally relate to the organization and conduct of the oral portion of hearings. The Board believes that the use of issues lists to organize evidence and panels can streamline the hearing process. The Board can see no significant merit in the other suggestions and considers iii) and vi) to be impractical.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

16. Written Final Argument:

Two submitters favoured written argument, while one favoured oral argument.

Rationale:

Written argument would eliminate several days from the length of public hearings.

Regulatory Principles Involved or Board Concerns:

There are no provisions of the National Energy Board Act or the Rules of Practice and Procedure which would dictate

the manner in which argument must be given. In addition, the principles of natural justice do not require that argument be in any particular form. It is clear, however, from the case of *Re: Attorney General of Manitoba and the National Energy Board et al* (1974 48 D.L.R. (3rd) 73 that a "hearing" before the Board is analogous to and imports a "trial" before a court of law. That being so, an applicant and opponents must be treated on an equal footing with no discriminatory advantage being bestowed on one side or the other. Consequently, parties must be treated equally and given an opportunity to make argument in the same manner.

Initial Board Reaction:

The Board believes that a decision regarding written versus oral argument is best taken considering the circumstances of each case. For most cases, the Board finds oral argument more helpful, but accepts that for non-complex hearings written argument may be more cost-effective.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

17. Natural Justice:

Submitters made a number of suggestions which generally relate to fairness and to procedures in the hearing room, most of which were dealt with in the Board's letter of 30 June 1987 or elsewhere in this paper. Two unresolved concerns are:

- (i) the Board's use letters of comment during cross-examination, and
- (ii) the use in toll decisions of important assumptions which were not known or tested in the hearing.

Rationale:

These points raise issues of fairness.

Regulatory Principles Involved or Board Concerns:

Section 33 of the draft NEB Rules of Practice and Procedure allows parties to make their views on an application known through letters of comment. All parties to the proceeding are provided with such letters. The Rules place no restrictions on the use of such letters in cross-examination,

or as evidence upon which the Board may rely in reaching its decision.

The principle that arises in the second point is that applicants have a right to know the case they have to meet.

Initial Board Reaction:

With respect to the first point, the Board appreciates the position of those who believe the use of letters of comment is being abused. It is not prepared, however, to place general restrictions on this procedure, but will be vigilant in attempting to discourage abuses.

With respect to the second point, the Board will make every attempt to ensure that an applicant is aware of its concerns through their inclusion in an issues list, an information request, or cross-examination at the hearing.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction, but chose to reinforce their previously expressed concern that the Board not use assumptions or scenarios in its decisions that have not been thoroughly canvassed in the hearing process.

Board's Current Position:

The Board adopts its initial reaction as its current position.

18. Hearing Costs:

Rationale:

Five submitters wanted the Board to place limits on the hearing costs that an applicant would be allowed to recover as a part of the approved cost of service.

Regulatory Principles Involved or Board Concerns:

If shareholders were required to absorb costs resulting from issues raised inappropriately, significant efficiencies could be achieved in the hearing process.

The Board has the power to disallow from the cost of service hearing-related costs which it finds were not prudently incurred. Intervenors have the opportunity to challenge such costs during toll proceedings.

To determine, in advance, an approved annual cost for hearings appears to the Board to have a number of drawbacks:

- (i) it is administratively very complex,

- (ii) it does not create any incentive for intervenors to use hearing time prudently, and
- (iii) it could fetter the Board's treatment of hearing costs in future toll proceedings.

Initial Board Reaction:

The Board believes that hearing costs can best be controlled through the content of the hearing. The issues list, discussed elsewhere, should help significantly in this regard.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

19. Reasons for Decision:

Concerns about the Board's Reasons for Decision involved both their timeliness and the elaboration of reasons.

Rationale:

If a decision is not received in a timely manner, companies are restricted in their ability to plan effectively, to forecast financial performance and to provide accurate and timely information to shareholders. If the Board indicated, through its reasons, what type of evidence it had found most helpful, it would aid parties in presenting future evidence and in determining whether the Board had erred in fact or in law.

Regulatory Principles Involved or Board Concerns:

It is the Board's policy to set out complete reasons for all of its decisions. For major hearings, involving complex issues and principles, the analysis of the evidence, the writing of reasons and the preparation and distribution of the report can take a considerable time.

The Board has had to deal with many complex issues in recent hearings, and recognizes that the preparation of its Reasons for Decision has taken somewhat longer than in the past. To put the current situation into perspective, the Board has prepared Figure 1 which compares hearing days and decision days for all TransCanada toll hearings since 1970. If one gauges the complexity of a hearing by the number of hearing days, the increased time taken to prepare decisions appears reasonable. In fact, the ratio of decision days to hearing days has continued to decline, as shown in Figure 2.

Figure 1
Comparison of Hearing and Decision Times

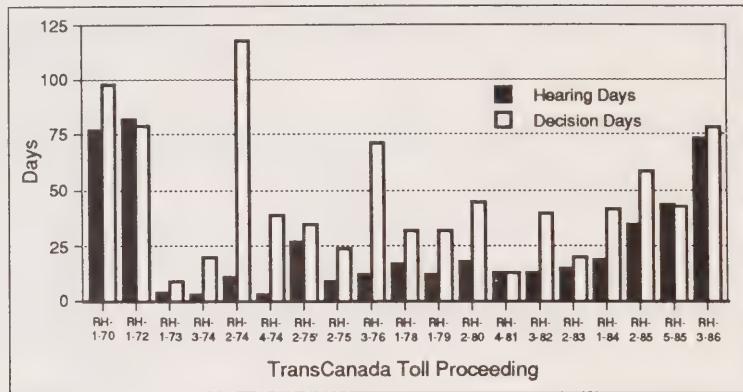
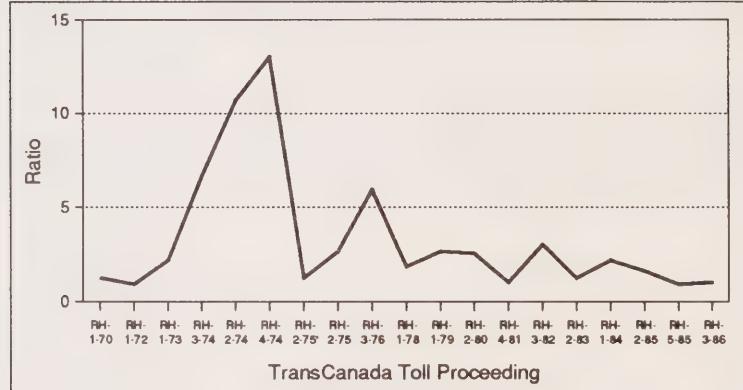


Figure 2
Ratio of Decision Days to Hearing Days



In some instances it is possible to issue a decision with reasons to follow, although it is difficult to see this being done for major toll cases. The Board suggests that applicants can help to minimize the impact of necessarily lengthy public hearing procedures by filing complete toll applications early enough to allow for a full public hearing process prior to the date the proposed tolls are to come into effect.

Initial Board Reaction:

The Board recognizes the importance of timely and well-reasoned decisions and will endeavour to eliminate any unnecessary delays in their preparation. The Board will continue to examine, on a case-by-case basis, the appropriateness of decisions with reasons to follow.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position: The Board adopts its initial reaction as its current position.

20. Technical Conferences:

Submitters were divided in their views as to the appropriateness of using technical conferences as part of the public hearing process.

Rationale:

Those in favour argued that technical conferences would assist in eliminating misunderstandings, isolate the major points of difference in expert opinion, and make more efficient use of hearing time. Those opposed argued either that technical conferences also involve substantial time and expense or that any issue serious enough to invoke the public hearing process should be examined entirely in public.

Regulatory Principles Involved or Board Concerns:

The Board has used technical conferences as part of its regulatory proceedings and believes they are compatible with the principle of fairness where they are used for the purpose of clarification, eliminating misunderstandings, or crystallizing areas of disagreement. The Board does not believe they should be used for purposes of issue resolution or settlement.

Initial Board Reaction:

The Board favours the use of technical conferences in appropriate circumstances, in particular where they contribute to an improved understanding of complex matters which will in turn permit more effective use of public hearing time.

Parties' Reply Comments:

Parties were in general agreement with the Board's initial reaction.

Board's Current Position:

The Board adopts its initial reaction as its current position.

Canadä